

**BEFORE THE CITY OF ALBUQUERQUE
LAND USE HEARING OFFICER**

APPEAL NO. AC-18-5

Project No. 10110S3 - 17BOA-20010, 16ZHE-S032S:

MARTINA MESMER, Appellant,

and,

**CONSENSUS PLANNING, Agents for
CITY OF ALBUQUERQUE PARKS and
RECREATION DEPARTMENT, Party Opponents.**

1 I. BACKGROUND & HISTORY

2 This is an appeal that originates from a decision of the Zoning Hearing Examiner (ZHE)
3 who approved an application for a conditional use special exception in an R-1 zone to allow
4 construction of a new community center facility at the Singing Arrow Park. After reviewing
5 all the evidence in the record, and after hearing arguments of the parties during a Land Use
6 Appeal hearing held on April 17, 2018, I find that this appeal should be denied. The decision
7 of the ZHE and subsequently affirmed by the Board of Appeals (BOA) is well-supported
8 with substantial evidence in the record.

9 There is considerable procedural history connected to the conditional use application.
10 The record reflects that in 1999, the City commissioned a City-wide study performed by
11 Kells & Craig Architects, that among other things, indicated that the East Gateway area of

12 the City lacked community facilities [R. 112]. Then in 2013, The City commissioned a
13 Needs Assessment to document the needs of the East Gateway community for “a new
14 Singing Arrow Community Center and to identify potential properties that meet the City's
15 criteria for siting a community or multigenerational center” [R. 139]. Based on numerous
16 selection criteria, the Singing Arrow Park was identified as the best location for a new
17 community center [R. 165]. In the City Zoning Code, § 14-16-2-6(B)(10), a community
18 center is a conditional use in an R-1 zone district. It is undisputed that the Singing Arrow
19 Park, located at 13001 Singing Arrow, S.E., is zoned R-1 [R. 308]. The record further shows
20 that on December 1, 2016, on behalf of the City, the contract project architect for the
21 proposed community center, Tina M. Reames, submitted a conditional use application to the
22 ZHE to construct the community center at the Park site [R. 306].

23 On January 17, 2017, the ZHE held a noticed, public hearing on the conditional use
24 application [R. 390-396]. On February 1, 2017, in a written decision, the ZHE made thirteen
25 findings, set two conditions and granted the conditional use application [R. 23-24]. A timely
26 appeal to the BOA followed (the first appeal) [R. 365].

27 On April 25, 2017, at a noticed public hearing, the BOA took up the first appeal. In a
28 decision dated April 25, 2017, the BOA expressly found that the ZHE “failed to adequately
29 support the conclusions reached in the ZHE report” and remanded the appeal to the ZHE to
30 better develop his findings and conclusion of law that can be supported by the record [R. 74].

31 The matter was scheduled to be reheard by the ZHE on June 20, 2017, however, at the
32 rehearing, the City’s contract project architect sought a continuance. The ZHE granted the
33 continuance to “address parking, safety and security, traffic and access, visual impacts/site

34 plan and expansion of community amenities” so that the parties could participate in a City
35 sponsored facilitated meeting [R. 80 and 305]. The facilitated meeting occurred on August
36 9, 2017 [R. 124]. And, on October 17, 2017, the ZHE revisited the conditional use application
37 in a second public hearing to rehear the application and to address the remand instructions
38 of the BOA [R. 85-108]. On November 1, 2017, in a written decision with 139 findings of
39 fact and 7 conclusions of law, the ZHE approved the conditional use application and granted
40 a conditional use permit to allow the community center to be constructed at the Singing
41 Arrow Park site [R. 3-14]. Appellant herein filed a timely appeal to the BOA (the second
42 appeal) [R. 28, 42-48].

43 The BOA took up the second appeal in its January 23, 2018 public hearing [R. 27A].
44 Finding that the ZHE’s decision and findings from the rehearing are supported with
45 substantial evidence in the record, the BOA affirmed the ZHE’s decision and denied the
46 second appeal [R. 6A-10A]. Appellant then filed a timely appeal of the BOA decision to the
47 City Council [R. 4A, 12A-14A]. Pursuant to Zoning Code § 14-16-4-4, the City Council
48 referred this appeal to its Land Use Hearing Officer (LUHO) [R. 72A]. A Land Use Appeal
49 hearing on the appeal was held on April 17, 2018.

50

51 **II. STANDARD OF REVIEW**

52 A review of an appeal is a whole record review to determine if the BOA or the ZHE
53 erred:

- 54 1. In applying adopted city plans, policies, and ordinances in arriving at the
55 decision;

- 56 2. In the appealed action or decision, including its stated facts;
57 3. In acting arbitrarily, capriciously or manifestly abusive of discretion.

58 At the appeal level of review, the decision and record must be supported by a preponderance
59 of the evidence to be upheld.¹ The LUHO is advisory to the City Council. If a remand is
60 necessary to clarify or supplement the record, or if the remand would expeditiously dispose
61 of the matter, the LUHO has authority to recommend that the matter be remanded for
62 reconsideration by the BOA or the ZHE. The City Council may grant the appeal in whole or
63 in part, deny it, or remand it to the LUHO, the BOA, or to the ZHE.²

64

65 **III. DISCUSSION**

66 As stated above, after reviewing the record of the evidence in this appeal, the decision
67 of the BOA affirming the ZHE’s approval of the conditional use permit is well-supported by
68 the record. In this appeal, however, the Appellant makes several imprecise arguments she
69 claims demonstrate that the ZHE and the BOA erred. She first generally contends that the
70 proposed design and location of the community center and its parking lot will cause “social
71 and environmental injury” to the neighborhood and to the City [Supp. Arg].³ More
72 specifically though, the Appellant argues that because the proposed community center
73 building will be sited on the Singing Arrow Park grounds, it will reduce a valuable and

1. For Appellant, I note that although each material finding of the ZHE must be supported by *substantial* evidence under § 14-16-4-2(B)(11), the standard for an appeal is that the decision of the BOA must be supported by at least a *preponderance* of the evidence to be affirmed. See § 14-16-4-4(E)(7).

2. See Rules of the Land Use Hearing Officer adopted by the City Council, February 18, 2004. Bill No. F/S OC-04-6 and codified in Section 14-16-4-4 of the Zoning Code.

3. Appellant’s spokesperson, Wanda UMBER, submitted a written argument and PowerPoint Exhibits at the LUHO hearing. Over the objections of the Party Opponents, the argument and Exhibits were accepted into the record.

74 limited “greenspace” resource for the area residents. Appellant further generally asserts that
75 this loss of greenspace conflicts with “established City goals and standards” [Supp. Arg].
76 Appellant also vaguely argues that the proposed community center will cause injury to the
77 users of the proposed community center because it omits outdoor facilities for children.
78 Appellant also generally challenges two significant studies in the record—a Needs
79 Assessment and an Archeological Testing study. Appellant also obscurely challenges the
80 architectural design of the proposed community center. Finally, Appellant claims that the
81 proposed community center will add traffic congestion and additional crime to the area of
82 which, she claims is an injury to the “community identity” [Supp. Arg.]. Similar arguments
83 were made to the ZHE and to the BOA.

84 To obtain a conditional use permit, an applicant must demonstrate with substantial
85 evidence that the use will not be harmful. Under § 14-16-4-2(C) of the Zoning Code, the
86 following conditional-use criteria is applicable to this appeal matter:

- 87 The city shall approve a special exception if the evidence presented to the
88 record shows that the following criteria are met. Although others may
89 submit evidence, it is the burden of the applicant to ensure that there is
90 such evidence in the record.
91
92 (1) A conditional use shall be approved if and only if, in the circumstances
93 of the particular case and under conditions imposed, the use proposed:
94 (a) Will not be injurious to the adjacent property, the neighborhood, or
95 the community;
96 (b) Will not be significantly damaged by surrounding structures or
97 activities [§ 14-16-4-2(C)].
98

99 As stated above the standard of proof to is substantial evidence. That is, there must be
100 substantial evidence in the record to support the ZHE’s decision. As indicated above, in the
101 second ZHE hearing on remand from the BOA, the ZHE made 139 findings to support his

102 conclusions of law regarding § 14-16-4-2(C).⁴ In his decision, the ZHE recognized that the
103 burden of proof for a conditional use requires facts to prove a negative inference that the use
104 will not injure and that the record must show a “reasonable grounds for presuming [a] lack
105 of injury” as substantial evidence. [R. 5, ¶25-26]. This is the correct standard. Under New
106 Mexico law, substantial evidence means such relevant evidence as a reasonable mind might
107 accept as adequate to support a conclusion.

108

109 **A. There is Sufficient Evidence in the Record that the Exchange of Green Space for the**
110 **Community Center Will Not Be Injurious to the Adjacent Property, the**
111 **Neighborhood, or the Community**

112

113 Appellant contends that because the proposed community center will be placed on a
114 portion of the Singing Arrow Park’s green space, the loss of green space is injurious to the
115 community. Appellants further contend that the East Gateway sector Development Plan
116 (EGSDP), which is the applicable City sector plan for the area, includes specific policies to
117 preserve green space for aquifer recharge and to generally protect the environment [Supp.
118 Arg.]. In the remand hearing, the ZHE made specific findings regarding the green space and
119 concluded that the loss of green space:

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...is a nominal impact on the available open space and green space and
does not conflict with the goals of the East Gateway Sector Development
Plan to maintain open space (noting that parks, major open space and golf
courses form the second largest component of land uses in the sector, at
491 acres or 14.1% of the total). EGSOP at 4-7 [R. 10, ¶98].

The BOA agreed. Like the ZHE and the BOA, I find that this conclusion is supported

4. In fairness, I note for the City Council, that not all 139 findings are findings of fact. Many of the ZHE’s numbered findings are mixed with foundations for factual findings and some are conclusions of law based on § 14-16-4-2(C).

127 with substantial evidence in the record. The record demonstrates that the Singing Arrow Park
128 encompasses a total of 692,544 sf. or 16-acres of land [R. 111]. The grass area of the park
129 (green space) and playground at the southwest corner of the park is approximately 6 acres or
130 260,320 sf. [R. 111]. The proposed community center building will reduce the green space
131 by 10.4%, a reduction of 27,073 sf. [R. 112].⁵ The landscaped area at the perimeters and
132 along the walks is approximately 3 acres or 118,769 sf. [R. 112]. In addition, the existing
133 Singing Arrow Community Center (which is on the Park grounds), the adjacent playground,
134 basketball court, and special parking encompasses approximately 43,139 sf. [R. 112]. These
135 facts are all undisputed.⁶

136 Appellant bears the burden of proof. Without pointing to *specific* policies that are alleged
137 to be contravened by the proposed conditional use, Appellant cannot meet her burden with
138 her broad contentions alone. Appellant failed to identify specific policies in the EGSDP to
139 support her contention that reducing green space violates the EGSDP, and the few policies
140 she did identify, I find are misinterpreted by the Appellant. Because the EGSDP is
141 incorporated by its reference in the record, I reviewed it and find no specific policies or goals
142 directly requiring preservation of green space in the EGSDP.

143 Appellant, however vaguely points to Goal 8.2 in the EGSDP as support for her theories
144 of harm. I find that Goal 8.2 expressly supports the ZHE’s decision because the author of the
145 recommendation advocates “expansion and/or possible long-term *replacement* of Singing

5. The record indicates that the proposed building is 15,000 sf. and there are adjacent paved areas and handicap accessible parking spaces totaling 27,181 sf. [R. 112]. It is not clear from the record whether the 10.4% also includes the 27,181sf. However, because it was undisputed that the reduction in green space will be 10.4%, 10.4% of 260,320 sf. of green space is 27,073 sf.

6. I note that Appellant seems to suggest that some of these facts are incorrect but has failed to explain the basis for disputing the facts. Nor has Appellant offered any evidence to support her claim that these facts are wrong.

146 Arrow Community Center to better serve neighborhood needs” (emphasis added) [EGSDP,
147 8.2]. Appellant also finds support for her contentions of harm in broad, somewhat ubiquitous
148 policy language in the EGSDP. For example, Appellants cites to broad language requiring
149 new development to “respect existing neighborhood values” and scenic resources claiming
150 that the community center will negatively impact this policy objective [EGSDP, 2-3, policy
151 d]. I find that Appellant has not put forth any objective evidence of neighborhood values to
152 ascertain whether this policy objective is violated.

153 The Appellant also contends that there are specific policies in the Singing Arrow
154 Neighborhood Plan (SANP) that are violated by the loss of green spaced caused by the
155 conditional use. However, the SANP was repealed in 1993 by the City Council in R-2010-
156 129 and it is therefore no longer applicable as City policy.

157 Appellant’s generalized claim of harm from the reduction of the green space in the Park
158 is unsupported with any objective facts, and the contentions alone are insufficient to rebut
159 the findings and conclusions of the ZHE. Although opinions matter, opinions must also be
160 supported with facts. Appellant has not met her burden of proof that the reduction of green
161 space will cause injury.

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163 **B. Appellant Has Not Shown with Competent Evidence How the Proposed Community**
164 **Center Will Create a Social Injury or Will Be Harmful to Children.**

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166 Appellant makes several arguments under the general headings of “social injury” and
167 “injury to children” [Supp. Arg.]. The arguments are based solely in subjective speculation
168 and irrational logic and the claims are not supported with objective facts or competent
169 evidence. Competent evidence is objective evidence that proves a relevant fact. The arguments

170 are based on mere subjective opinions. Generally, witnesses must testify to facts, and not to
171 opinions. A lay person who gives opinion testimony must show first-hand knowledge of the
172 facts supporting the opinion and make a rational connection between the observations made
173 and the opinions formed. Appellant offered no supporting competent evidence for the
174 numerous allegations in their appeal arguments.

175 Without evidence, the Appellant contends that the project experts miscalculated the
176 Park's size and ratios of residents per acre of park lands, as well as the impact to the
177 environment of adding a second building at the site. Appellant claims that these issues all
178 contribute to a generalized ill-defined social injury. Again, without supporting evidence, broad
179 assumptions drawn from speculation and opinions do not satisfy any evidentiary standards to
180 rebut the findings and conclusions of the ZHE or the BOA.

181 Appellant next essentially claims that because the proposed community center does not
182 include "outdoor facilities" or "activities" for children, it will harm them. As with the alleged
183 social injury, Appellant's arguments that the community center will be injurious to children is
184 similarly flawed and unsupported with evidence of actual harm. Appellant's theory of injury
185 to the children is based in pure supposition and I find that it is insufficient to rebut the findings
186 of the ZHE. The ZHE was faced with the same unsupported allegations and he aptly
187 commented on it this way:

188 Simply identifying a potential injury, without evidentiary support, does not
189 automatically make the Applicant responsible for disproving it [R. 5, ¶25].

190
191 The Appellant's theory of harm is circular and without evidentiary foundation. She contends
192 that the existing community center includes outdoor activities and when the children will be
193 transferred to the new facility (because the old facility will close as a community center) the

194 children will be harmed because they had something they will no longer have—outdoor
195 activities. However, Appellant also argues that the existing facility is decaying and will harm
196 children when it is transformed, in its current dilapidated state, into a child development center.
197 The argument is based on serial unsupported premises and makes no sense at all and I find that
198 it is insufficient to reverse the decisions of the ZHE and he BOA.

199

200 **C. Appellant has not Met Her Burden Challenging the Needs Assessment or the**
201 **Archeological Testing Report**

202

203 Appellant next contends that the two studies in the record, a 2013 Needs Assessment and
204 a 2016 Archeological Testing report, are flawed and should not have been relied on by the
205 ZHE in his decision. First, Appellant generally contends, without any proof, that the Needs
206 Assessment is outdated. She also claims that there is no proof that the neighborhood
207 residents were asked about the needs of its community or participated in the Needs
208 Assessment. I find that these contentions are not only unsubstantiated, but that there is no
209 meaningful, direct association between the harm alleged and the standard of proof for a
210 conditional use under the Zoning Code. It is not the Needs Assessment that is at issue in this
211 appeal, it is the community center as a conditional use that is appealed. I find that the
212 procedural execution of how the Needs Assessment was created is irrelevant to this conditional
213 use appeal. I note also that the Appellant did not meet her burden in challenging the substantive
214 findings of the Needs Assessment.

215 I next find that there is more than substantial evidence in the record that demonstrates
216 that the benefits of a new community center, as a conditional use, will substantially outweigh

217 the minimal speculative injuries alleged by Appellant. There is much undisputed evidence in
218 the record, specifically in the Needs Assessment study, that demonstrates the new community
219 center will meet “service gaps” identified in the area. For example:

220 The existing Singing Arrow Community Center meets some of the needs
221 for before- and afterschool programs and summer programs, for lower
222 income school-age children in the area. A new, expanded facility could
223 serve more families and also potentially offer facilities such as a fitness
224 room and classes for adults and teens in the nearby area [R. 165].
225

226 This finding from the Needs Assessment was undisputed so I find that it, and others like it
227 therein, support a finding under § 14-16-4-2(C) that the use will not cause injury to the
228 community at which it is located.

229 In addition, regarding accessibility, traffic, and safety, which were all raised by the
230 Appellant, it was determined that the proposed site at the Singing Arrow Park:

231 ...has sufficient space and is more easily accessed by auto and transit. It
232 would offer "eyes" on the park, contributing to safety, and provide
233 restrooms to facility and park users. Its location is within or near the census
234 blocks with the lower median household incomes in the study area.
235 Community center users would have access to the Singing Arrow Park as
236 well as the Tijeras Arroyo and scenic views of the mountains [R. 165].
237

238 The Needs Assessment includes ample evidence to support the ZHE’s finding that the
239 conditional use will not harm the community. Although Appellant generally claims that the
240 Needs Assessment is flawed because of how it was created, she failed to rebut any of the
241 findings or recommendations in the Needs Assessment with competent evidence.

242 Appellant also generally contends that the City failed to demonstrate how adding a
243 second building at the Park site will impact the community. She suggests that two buildings at
244 the Park (the old and new community center) will somehow harm the neighborhood and this
245 issue should have been resolved in the Needs Assessment. The issue for the ZHE, however, is

246 to determine if the proposed community center use will be injurious to the neighborhood. I
247 find that the City did not error. There is no evidence presented by Appellant to show how the
248 neighborhood is harmed with a new community center building and use.

249 As for the Archeological Testing report in the record, Appellant obscurely contends
250 that the Report demonstrates the conditional use *may* cause harm to the nearby archeological
251 site. The Report indicated that the proposed community center will be located just north of a
252 protected fenced-in archeological site---the Rancho de Carmué archeological site [R. 176].
253 The archeological site is a 7.8-acre, privately-owned vacant lot [R. 176]. The testing
254 encompassed an “intensive pedestrian survey” which included ground tests performed by
255 archeological experts to determine how the proposed construction and community center use
256 will affect the site [R. 191]. The author of the Testing report found that “[t]he survey and
257 testing...demonstrate that the proposed park development would have no effect on cultural
258 resources” [R. 200]. Appellant did not offer any facts to rebut the results of the archeological
259 testing that took place and I find that Appellant’s contention regarding harm to the site is
260 without merit.

261

262 **D. The proposed Parking Lot, Traffic, Design, and Safety Issues.**

263 Appellant next contends that the new community center will cause harmful traffic, crime,
264 and the parking lot is inadequate. There is, however, substantial evidence in the record that
265 safety from crime was a significant consideration for the project architect when the conceptual
266 design and placement of the building was determined [R. 117, 165]. Appellant did not rebut
267 this evidence. Moreover, the community center’s conceptual architectural design is more

268 remarkable than not in terms of its exterior visual aesthetics. It is not merely a box design [R.
269 117-118].⁷ Appellant may disagree and may not like the conceptual design, but there is no
270 policy objective or goal in the EGSDP or in the Comprehensive Plan that Appellant has cited
271 to demonstrate that the design is injurious to the neighborhood.

272 There is sufficient evidence in the record demonstrating that in designing the building,
273 the project architects took into consideration visual sight-lines for added safety [R.117-118].
274 Moreover, there is evidence that the building will have high-tech camera systems and better
275 lighting to assist in protecting patrons and their property in the parking lot [R. 63A]. The ZHE
276 made several findings of fact on the crime issue based on the testimony of Albuquerque Police
277 Commander, Fernando Aragon [R. 8, ¶68-74]. Commander Aragon testified that it was his
278 belief that updating the parking lot and the design of the new community center will help
279 alleviate crime, not increase it [R. 102-103]. I find Commander Aragon’s testimony credible
280 primarily because he is, to some extent, in charge of the safety of area residents and property.
281 Commander Aragon is fundamentally an expert in the area’s crime and his testimony is not
282 mere speculation but based on his training and experience.

283 Appellant did submit evidence in the record regarding crime in the area. The evidence
284 was anecdotal, demonstrating that there is considerable crime around the Park.
285 Notwithstanding, Appellant did not link the crime to the proposed new community center. The
286 BOA addressed Appellant’s conjecture. The BOA found that the Appellant failed to:

287 ...prove that there is a nexus between future construction of the
288 Community Center and increased criminal activity [R. 9A, ¶20].
289

7 I note that the evidence of a design for the new community center is only a conceptual design at this phase [LUHO R. Tr. 42:23].

290 The fact that there is crime in the area alone, is insufficient to conclude that the community
291 center will attract additional crime. Without more, such a conclusion would require
292 inappropriate supposition. In this appeal, Appellant did cite to two studies in her written
293 supplemental arguments she claims supports that there is a connection. However, citation to
294 studies which Appellant claims supports her broad contention is insufficient evidence to
295 support that contention. The studies are not in the record and therefore they cannot be tested
296 for the propositions Appellant alleges they support.⁸

297 I note that Appellant cited two Comprehensive Plan policies she claims are violated by
298 the Community Center [Supp. Arg.]. These policies generally concern parks and recreation
299 policies of the Comprehensive Plan (Comp. Plan). After, reviewing all the Parks and
300 Recreation policies of the Comprehensive Plan, I find that they are not violated by the new
301 community center's placement in a City Park. Despite Appellant's contrary contentions, I find
302 that it is anticipated in the Comprehensive Plan that community centers go together with parks
303 and recreation objectives in the Comp. Plan. [See Comp. Plan, 12-16 and def. of community
304 centers, A-5].

305 Appellant next contends that the new community center will cause excessive traffic.
306 However, Appellant failed to support these contentions with objective evidence. I find these
307 arguments tenuous and unsupported with facts. They are based merely on opinion and
308 conjecture. Significant to this finding, the evidence in the record demonstrates that the
309 proposed use does not warrant a traffic impact study because the traffic caused by a 15,000-sf.
310 community center does not meet the threshold under City policy [R. 84D]. Appellants did not

8. I note that one of the studies referenced by Appellant appears to be a limited study on bus-stops. Bus-stops and community centers are conspicuously dissimilar.

311 demonstrate otherwise.

312 Appellant also argues that the parking lot lacks safety and adequate spaces for the use.
313 The evidence demonstrates that the existing parking lot at the Park will be redesigned to
314 accommodate 114 spaces, more than what is necessary based on commercial uses and
315 recreation uses in the Zoning Code [R. 120]. See ZHE Findings, 87-94 [R. 9]. Appellant did
316 not rebut the evidence or the findings of the ZHE with competent evidence.

317

318 **IV. CONCLUSION**

319 Finally, I note for the City Council that Appellant also claims that the ZHE and BOA
320 simply ignored people who spoke out against the project at the hearings. There is no evidence
321 that the ZHE or the BOA ignored anyone in these appeals. The fact that there was one
322 remand, followed by a very lengthily decision from the ZHE belies the claim.

323 For all the reasons described above, I respectfully recommend that Appellants' appeal
324 be denied in full. The ZHE and the BOA each held two hearing on the application and
325 appeals, at which the applicants included in the record substantial evidence to support the
326 final decision of the BOA. The findings of the ZHE are well-supported by the record with
327 substantial evidence and it should be upheld. The BOA did not err in denying the appeal.



Steven M. Chavez, Esq.
Land Use Hearing Officer

April 25, 2017

Copies to:

Appellants, Party Opponents, City Staff